Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

KEVIN SEARLES and DEBRA SWANSON,
Petitioners,

vs.

JATIN PATEL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On March 21, 1996, the mother and sister of plaintiff-respondent Patel were found murdered in the mother's home. Defendants-petitioners were the police officials primarily responsible for the investigation of these murders, which has yet to result in an arrest. In an effort to advance the investigation, the complaint alleged, petitioners concocted and disseminated to members of respondent's family certain allegedly false information regarding him and his suspected involvement in the murders. Respondent alleged that this resulted in his being "ostracized" from members of his family, in violation of his constitutional right of intimate association. Petitioners moved for judgment in their favor pursuant to F.R.C.P. 12(c), in relevant part on the ground that their conduct, as alleged in the complaint, did not violate any clearly established law of which they reasonably should have known, and they were therefore entitled to qualified immunity. Despite its express acknowledgment of both the uncertain contours of the constitutional right in issue and the complete absence of clearly-established law prohibiting the conduct complained of, the Second Circuit affirmed the denial of petitioners' motion because it was presented "at the pleading stage of this litigation", and because the complaint "alleged sufficiently serious misconduct".

THE QUESTIONS PRESENTED ARE:

1) Whether the constitutional right to intimate association, enunciated generally in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), establishes constitutional restrictions on the investigatory conduct which may be engaged in by police officers and other officials engaged in investigations of crimes; and

2) Whether the Second Circuit erred in holding, despite its express acknowledgment both of

uncertainty about the contours of the right to intimate association and the complete absence of case law based upon a fact pattern similar to this case, that the petitioners were not entitled to qualified immunity upon their motion for judgment on the pleadings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion, captioned *Patel v. Searles*, Honorable Stefan R. Underhill, J., denying petitioners' motion for judgment on the pleadings, is published at 2000 WL 1731339 (D. Conn.). The court of appeals' decision, Honorable Richard J. Cardamone, J., joined by Pooler and B.D. Parker, JJ., affirming the district court's decision, is published at *Patel v. Searles*, 305 F.3d 130.

STATEMENT OF JURISDICTION

The district court denied the petitioner's motion pursuant to Federal Rule of Civil Procedure 12(c) based on qualified immunity. Petitioners timely brought an interlocutory appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). The court of appeals entered its opinion and order on September 30, 2002. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the First, Fourth, Ninth and Fourteenth Amendments to the Constitution of the United States are reprinted in the Appendix at 31a-34a. The provisions of 42 U.S.C. § 1983 are reprinted in the Appendix at 35a.

STATEMENT OF THE CASE

Petitioners Searles and Swanson are the chief and a detective, respectively, on the Windsor, Connecticut Police Department. On March 21, 1996, respondent's mother and sister were found brutally murdered in the mother's home in Windsor. Petitioners headed the investigation of the crimes.

Despite the investigation and intervening six years, the case remains unsolved at this time.

During the course of their investigation, petitioners are alleged to have engaged in certain specific conduct relating to respondent and members of his family. Because this case came to the court of appeals on petitioners' motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) ("Rule 12(c)"), the court of appeals (like the district court before it) accepted as true respondent's allegations regarding petitioners' investigatory conduct. *Patel*, 305 F.3d at 133-34.

In particular, petitioners are alleged to have: 1) created certain "phony" confession letters blaming respondent's cousin for the murders, and mailed them to the respondent's father and two local newspapers, then suggested falsely that the letters were possibly typed on respondent's typewriter; 2) prepared a memorandum in response to inquiries by family members outlining the basis for the investigators' labeling of respondent as a "suspect", which memorandum allegedly contained four misstatements of fact; and 3) drafted and delivered to respondent's wife a handwritten letter falsely accusing respondent of causing the murders, either directly or through the leading of a "double life", and suggesting that he could again reach that point of anger so as to be a danger to respondent's wife and children. *Id.; at 134;* Amended Complaint, ¶¶ 9, 10, 11, 12, Pet. App. 25a-27a.

Respondent alleged that, because of the petitioners' conduct, he was "ostracized" from the majority of his family and friends, and that his siblings and father refused to talk with him. *Patel, 305* F.3d at 134. He also alleged that he was "forced" to leave his employment and residence in the State of Connecticut as a result of petitioners' conduct. *Id.* Respondent did not allege any impact on his relationship with his wife and children, who moved

with him. Again, because the case was presented at the Rule 12(c) stage, the court of appeals accepted as true respondent's allegations concerning the effects of petitioners' conduct on his family life.

Petitioners answered the amended complaint and promptly moved for judgment on the ground that they had violated no clearly established law of which a reasonable official in their position would have been aware. The district court denied the motion, and petitioners timely appealed pursuant to the collateral order doctrine.

In addressing petitioners' initial argument that respondent had failed to state a violation of the constitutional right to familial association under the allegations of the amended complaint, the court of appeals first traced the genesis of the right to this Court's decision in *Roberts v. United States Jaycees*, 468 U.S. 609 (1983). The court then applied that right, for the first time of which petitioners are aware, to find unlawful the investigatory conduct allegedly engaged in by petitioners. In doing so, the court departed markedly from this Court's prior cases and those of other circuits. The court of appeals rejected petitioners' contention that the conduct in issue here did not result in a sufficiently severe impairment – a complete or permanent, physical deprivation – of respondent's intimate association, as previously required to state a constitutional violation even in the Second Circuit. The court likewise rejected a requirement of some circuits that the petitioners' conduct be "directed at" the relationships, rather than merely affecting them incidentally to some other purpose. Further, the court of appeals declined to restrict the scope of the relationships to which the right might be applicable, unlike every other circuit to consider the matter. Finally, the Second Circuit disregarded concerns of other courts about mere duplication of existing state law tort remedies, asserting that the alleged dissemination of "false and

defamatory information" about respondent to his wife was in itself "sufficient to implicate plaintiff's right to intimate association" – even though respondent never alleged any impact whatsoever on his relationship with his wife.

In considering petitioners' claimed entitlement to judgment under Rule 12(c) on the basis of qualified immunity, the court of appeals first determined that "at least the general right to intimate association" was clearly established in this Court's decision in *Roberts. Patel*, 305 F.3d at 139. The court of appeals then acknowledged that its own precedents in the "more common fact pattern of a child abuse investigation have not delineated the exact boundaries of associational rights, making it difficult for social workers to know when their actions were unconstitutional." *Id.* The court further explicitly acknowledged that, "neither the Supreme Court nor this Court has ever ruled upon a fact pattern similar to the one now before us...." *Id.*

Nevertheless, the court of appeals declined to afford petitioners qualified immunity. It did so because the case was presented "at the pleading stage", and because the respondent had "alleged sufficiently serious misconduct that were we to reverse the district court, it would be equivalent to holding that the right to intimate association does not impose any clearly established limits on the tactics that a police officer may use in the course of an investigation." *Id.*

This petition followed.

REASONS FOR GRANTING THE PETITION

The petition should be granted for at least three reasons.

First, the decision of the Second Circuit in this case is in real conflict with a number of decisions of this Court. The court of appeals applied this Court's associational rights analysis to restrict the tactics of

police officers engaged in a criminal investigation, in a manner never sanctioned by this Court. The court of appeals also declined to resolve the qualified immunity issue at the earliest possible stage of the litigation, and instead effectively established a different standard for considering that issue merely because it was presented at the pleadings stage of this case. Even more remarkably, the court of appeals denied qualified immunity to the petitioners despite its explicit acknowledgment that there was no precedent either from this Court or the Second Circuit by which the officers could have known that their conduct violated the Constitution.

Second, the decision below is in significant conflict with decisions of other courts of appeal, – and indeed with other decisions of the Second Circuit, in its definition of the contours of the right in issue. The court of appeals here found an adequately stated violation of respondent's constitutional right to family association despite the absence of a physical, complete or permanent alleged deprivation of the association. The decision below rejected a requirement that the conduct in issue be intentionally directed at disruption of the relationships, as opposed to affecting them only incidentally to some other purpose. Further, the court specifically declined to limit the reach of the right in issue to those relationships meeting the tests espoused by this Court. Finally, the decision below effectively established different qualified immunity standards for social workers and police officers, disregarding its own recent precedent granting qualified immunity to the former group of government officials. In all these respects, the court below departed from decisions of other circuits.

Third, but of no less significance, the decision below leaves police officers in the situation of petitioners – investigating criminal activity – with no useful description of the contours of the right in issue

and no meaningful protection under the qualified immunity doctrine, so long as "family members" are involved. Instead, the court of appeals utilized the "nebulous" right of intimate association to dramatically blur the lines describing lawful and unlawful police investigatory conduct. In permitting the prospect of civil liability here, the court broadly proscribed even police investigative tactics which have never resulted in, for example, the preclusion of evidence or confessions, under established principles of criminal constitutional jurisprudence. Worse still, the decision manufactured a requirement that police officers treat differently complainants, witnesses, informants and even accomplices, who are (or may prove to be) family members, as opposed to those who are not, for fear of engaging in what a later court of appeals might deem "sufficiently serious misconduct", provided that family members are involved.

I. The Decision Below Conflicts Directly With Repeated Decisions Of This Court Upholding Qualified Immunity In The Absence Of Clearly Established Law.

A. The Qualified Immunity Standard.

Since at least this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the qualified immunity doctrine has shielded from liability government officials such as police officers engaged in the performance of discretionary duties, so long as their conduct did not violate clearly established law or it was objectively reasonable for them to believe their conduct did not violate clearly established law. *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987). As this Court has repeatedly emphasized, the doctrine represents an immunity from suit, and not merely a defense to liability. *Swint v. Chambers County Comm'n.*, 517 U.S. 35, 42 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). For this reason, the Court has repeatedly admonished courts to decide the issue

of qualified immunity "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

The policy considerations underlying the doctrine of qualified immunity are familiar. In light of those considerations, government officials are not required to predict the course of future constitutional adjudications and structure their conduct accordingly. Rather, such officials generally may be liable only where they reasonably should be "on notice" that their conduct runs afoul of some constitutional shoal, in light of clearly established law charting the boundaries of permissible conduct. *Hope v. Pelzer*, 536 U.S. __, 122 S.Ct. 2508, 2515 (2002), quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001). The appropriate question, then, is whether the state of the law at the time of the conduct in issue gave the officers "fair warning" that their conduct was unlawful. *Hope*, 122 S.Ct. at 2516.

The qualified immunity doctrine is purposefully crafted to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Where reasonable officials could disagree about whether particular conduct is unlawful, qualified immunity is available. *Id.*, at 344-45. The doctrine thus specifically recognizes that, where there is uncertainty surrounding the lawfulness of particular governmental conduct, immunity from liability should be available. *Harlow*, 457 U.S. at 818.

"This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition...." *Saucier*, 533 U.S. at 201; *c.f.*, *Anderson*, 483 U.S. at 640. Thus, the Court has repeatedly instructed, it is essential to focus on the "particular police conduct" at issue. *Saucier*, 533 U.S. at 205.

An official is not necessarily entitled to qualified immunity simply because no court has held the exact action in question to be unlawful. *Mitchell*, 472 U.S. at 335 n.12. Nor, as this Court has recently explained, is there always a requirement that a prior case involving "fundamentally similar" or "materially similar" facts have been decided, in order to "clearly establish" the applicable law. *Hope*, 122 S.Ct. at 2516. The question is whether the official had "fair warning" that the conduct was unconstitutional. *Id.*

However, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. That is, in light of pre-existing law, "the unlawfulness must be apparent." *Id.* If the officer's conduct is not *clearly unlawful*, in light of "a clearly established rule prohibiting the officer from acting as he did," he is entitled to qualified immunity. *Saucier*, 533 U.S. at 208.

This inquiry must necessarily focus on the law existing at the time of the alleged violation. *Hope*, 122 U.S. at 2516; *Anderson*, 483 U.S. at 640; *c.f., Frazier v. Bailey*, 957 F.2d 920, 929 (1st Cir. 1992) ("a court may not find that the right was established through the use of hindsight").

Of course, the qualified immunity issue is not reached at all if a plaintiff fails to adequately state a claim for deprivation of an actual constitutional right in the first place. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). In its decision below, the court of appeals seemed unduly fixated on this aspect of the analysis, seeking not merely to reaffirm the existence of a general constitutional right to intimate association, but to significantly broaden the application and scope of a right acknowledged by other circuits to be "nebulous", in decisions issued not long before the conduct alleged in this case. In so doing, the court expressed the overt fear that,

> [w]ere we to reverse the district court, it would be equivalent to holding that the right to intimate association does not impose any clearly established limits on the tactics that a police officer may use in the course of an investigation.

Patel, 305 F.3d at 139.

Indeed, the first question for this Court thus may be whether the right to intimate association does regulate police investigatory conduct at all, under circumstances such as are presented here. As discussed below, petitioners suggest that significant considerations of policy and practicality argue that this particular constitutional right does not.

However, even if it does, under the circumstances of this case, in light of the utter absence of guiding precedent in this Court and elsewhere as expressly admitted by the court of appeals, these petitioners should enjoy the protection of qualified immunity.

B. The Second Circuit Misapplied This Court's Qualified Immunity Analysis In Three Key Respects.

1. The court of appeals' decision stresses repeatedly that its decision was taken at the pleading stage of this litigation, requiring the court to accept the plaintiff's allegations as true and construe them in the light most favorable to plaintiff. *Patel*, 305 F.3d at 134-35. As the court noted, under this accepted standard a complaint will be dismissed only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.*, quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court below explicitly stated that, in view of this posture, "we are unable to conclude that" the *Conley* standard had been met. *Patel*, 305 F.3d at 139.

In so holding, the Second Circuit failed to adhere to the established principle that the qualified immunity issue should be resolved "at the earliest possible stage in litigation". *Hunter, 502 U.S.* at 227. Instead, the court of appeals relegated petitioners to discovery, further pleadings, liability exposure, distraction from their official duties, and all the other burdens of litigation the doctrine of qualified immunity was expressly designed to avoid.[1] *Saucier*, 533 U.S. at 200-01; *Mitchell*, 472 U.S. at 526.

The court of appeals missed the qualified immunity mark because it failed to identify correctly the "earliest possible stage" at which the immunity issue could be resolved. *Hunter*, 502 U.S. at 227. Even while the court expressly acknowledged the absence of clearly established law, it failed to accord that absence its clear, dispositive effect: "if the controlling law is not clearly established, an official cannot be liable, because 'a reasonable person would not be expected to know how to structure his conduct to avoid liability.'" *Anderson*, 483 U.S. at 640 (internal citation omitted).

Whatever the court of appeals' interest in exploring any limitations on police conduct to be found within the right to intimate association, that discussion should have concluded with the determination that these petitioners could not be liable for conduct which had never been proscribed with any degree of clarity, so as to give them "fair warning". *Hope*, 122 S.Ct. at 2516. There could be no possible change in the status of the law applicable to their conduct, between the pleadings stage and any

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[1] It is also noteworthy in this case that the usual liberal federal discovery practice would permit respondent, the prime suspect in a double homicide, to engage in comprehensive inquiry into the evidence, witnesses, theories and mental processes of the very investigators responsible for pursuing the murderer(s). On this basis, the district court stayed discovery pending resolution of petitioners' dispositive motion.

later stage of the litigation (such as summary judgment), since the relevant law was that which existed prior to the conduct in issue. *Wilson v. Layne*, 526 U.S. at 609.

As the Fourth Circuit Court of Appeals aptly stated in another case:

> [we] commend the [ ] court's thoughtful consideration of the familial privacy right, but note that it is this very need for such complex legal analysis that renders a denial of qualified immunity inappropriate in this case.

Hodge v. Jones, 31 F.3d 157, 167 (4th Cir.), *cert. denied*, 513 U.S. 1018 (1994) (child abuse investigation).

2. The court's expressed fear, precluding a finding of qualified immunity at the pleadings stage, was that "it would be equivalent to holding that the right to intimate association does not impose any clearly established limits on the tactics that a police officer may use in the course of an investigation." *Patel*, 305 F.3d at 139. The necessary implication of this statement is that, in the Second Circuit's view, the right to intimate association does impose "clearly established limits" on police investigative tactics.

It is of course well-recognized that other constitutional provisions do impose limits and restrictions on police investigative tactics. This Court has observed, for example, that "the Fourth Amendment was tailored explicitly for the criminal justice system...." *Gerstein v. Pugh*, 420 U.S. 103 (1975). To the extent that even a minimal "seizure" is involved, the Fourth Amendment clearly applies. *Terry v. Ohio*, 392 U.S. 1 (1968). And, to the extent a criminal conviction is obtained by means of tactics which offend the traditions and shock the conscience of our society, the Fourteenth Amendment has been

held to apply. *Rochin v. California*, 342 U.S. 165 (1952).

Petitioners freely concede that the United States Constitution in some circumstances protects familial relationships from unwarranted government interference, as a matter of fundamental liberty interests. *E.g., Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). However, in no precedent of this Court, identified by petitioners or cited to the courts below, is it postulated that police investigative conduct such as that in issue here is proscribed by the right of intimate association. The proposition that such a source exists for regulation of police investigative conduct is not merely novel; it has practical and policy implications and effects which render it a troubling departure from previous decisional law relating to police investigative conduct, as discussed *infra*.

The *Patel* court's qualified immunity discussion -- admitting the complete absence of factually similar precedent -- fully illuminates that departure. Moreover, it points up the "fundamental error" of that court in its application of the qualified immunity analysis here: the overly "generalized formulation of a constitutional right which prevents reasonable government officials from knowing just what conduct is actually prohibited by the broad concept of family inviolability." *Hodge*, 31 F.3d at 167 citing *Anderson*, 483 U.S. at 689.

The Second Circuit panel premised its understanding of the right to intimate association, as had the district court, on *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). *Patel*, 305 F.3d at 135-36. As the court of appeals noted, *Roberts'* discussion of the right to intimate association "cited a number of substantive due process cases" affording "highly personal relationships a substantial measure of sanctuary from unjustified interference by the state." *Id.*, quoting *Roberts*, 468 U.S. at 618-19. The

principal thrust of this portion of *Roberts* was to identify the types of relationships that, in general and in appropriate circumstances, might warrant constitutional protection. As the Second Circuit put it, "[w]e agree that *Roberts* established a sliding scale for determining the amount of constitutional protection an association deserves...." *Id.*

Roberts, of course, says not a word about police investigative conduct. Rather, it speaks only in the most general possible terms of "undue" or "unjustified" or "unwarranted" interference by the state in the kinds of relationships warranting constitutional protection. *E.g.*, 468 U.S. at 618. While the cases cited for this proposition encompass "interfering" conduct, such as seizures of children by social workers and police shootings, as the court of appeals itself noted these were substantive due process cases. In this Court's decisions, such cases carry distinct and long-established standards of their own, under which the viability of the claimed constitutional violation may be assessed. E.g., *Rochin v. California*, 342 U.S. 165, 172-73 (1952] ("shocks the conscience" test).

In *Patel*, the Second Circuit never examined the question of whether another specific constitutional provision governs the type of police conduct here in issue. It thus disregarded this Court's caution that substantive due process should not be called upon if a constitutional claim is covered by a specific constitutional provision. *United States v. Lanier*, 520 U.S. 259, 272 n. 7 (1997). It also ignored this Court's often-expressed reluctance "to expand the concept of substantive due process, because guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992).

3. The court of appeals here focused its discussion almost entirely on the general existence of

the claimed right and the alleged impact of the petitioners' conduct, rather than on the conduct itself. In that respect, it also failed to follow this Court's admonitions to examine the "particular conduct" in issue. *Saucier*, 533 U.S., at 201.

In this case, the respondent claimed that petitioners: 1) drafted and mailed to two newspapers and respondent's father "fake" confession letters blaming respondent's cousin for the murders, falsely claiming they possibly came from respondent's typewriter; 2) a year later, prepared a memorandum "expressly for the purpose of responding to family members' inquiries concerning the department's labeling of the plaintiff as a suspect", Amended Complaint, ¶ 10, 26a, which memorandum allegedly contained four material misstatements of fact, with the consequence of "defaming and disparaging the plaintiff" (*id.*, ¶ 11); and, twenty months after the murders, drafted and delivered to respondent's wife a hand-written letter from petitioner Swanson in which she falsely accused respondent of causing the murders and leading a double life, and suggested that the wife and her children might be in danger if he reached that point of anger again. *Patel*, 305 F.3d at 134.

The court of appeals characterized these three (3) specific occurrences over a twenty-month span as "an extended public and private defamatory misinformation campaign to destroy a family." *Id.* at 140. The court of appeals further held that, despite the admittedly novel fact pattern, "we do not think it would be objectively reasonable for the police to engage in" such a campaign. *Id.* This alleged conduct, the court of appeals stated, was "sufficiently serious" to deny the petitioners qualified immunity.

Although the panel below did not focus on the precise nature of petitioners' alleged misconduct, it seems noteworthy that two of the three acts involved

little more – or nothing more – than the mere expression of opinions labeling Patel as a "suspect". Even if done without any basis whatever, which respondent did not allege, this "labeling" constitutes nothing more than an expression of belief. As respondent alleged, the "Swanson memorandum" was not even prepared on an official police form. Similarly, the "handwritten letter" delivered to respondent's wife merely reiterated that Patel was a suspect, and that, in Swanson's opinion, he might be a potential danger to the wife. Viewed in this manner, it is unsurprising that the court of appeals could identify no clearly established law prohibiting the conduct complained of.

In making the leap from *Roberts'* discussion of associational rights to "clearly established limits on the tactics that a police officer may use in the course of an investigation," the court of appeals acted with absolutely no guidance or authority from this Court. Instead, the court of appeals erred when it analyzed the constitutional right upon which it relied in terms that were so generalized as to render the inquiry irrelevant. *Saucier*, 533 U.S. at 201-02. On the contrary, the decision below amply demonstrates that nothing "clearly established" about the right to intimate association in 1996/97 would have made it "clear to a reasonable officer that his conduct was unlawful in the situation he confronted". *Id.* at 202.

II. The Decision Of The Court Of Appeals Conflicts In Significant Respects With Decisions Of Other Circuits Circumscribing The Contours Of The Right To Intimate Association.

As noted above, for purposes of the qualified immunity analysis here the relevant case law is that existing from this Court and the Second Circuit prior to the conduct in issue. *Hope*, 122 S.Ct. at 2519. Beyond real dispute, none of that precedent would

have made clear to petitioners that the complained of conduct was unlawful.

Nevertheless, the panel below has now purported to find "clearly established limits" on police investigatory tactics grounded in the right to intimate association, including a prohibition on the conduct alleged here. In order to do so, the court was obliged to reject significant restrictions on the contours of that right as identified in the decisions of other circuits. As a result, the decision below virtually eliminates any minimum, threshold level of police conduct which might be subject to judicial regulation under the auspices of the right to intimate association.

Numerous cases in which the conduct of government officials has been scrutinized under the right of familial association have arisen in the context of child abuse investigations. Those cases have at least partial constitutional genesis in *Santosky v. Kramer*, 455 U.S. 745 (1982), in which this Court found an abstract liberty interest in parents' care and management of their children, and held that a state cannot permanently sever the parent-child relationship without providing parents with "fundamentally fair procedures." *Id.* at 754.

Following *Santosky*, several circuits including the Second Circuit issued decisions which identified circumstances in which the constitutional right to intimate association could be invoked to regulate direct government involvement in, especially, the parent-child relationship. *See, e.g., Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000); *Harbury v. Deutch*, 233 F.3d 596 (D.C. Cir. 2002); *Wilkinson v. Russell*, 182 F.3d 89 (2d Cir. 1999), *cert. denied* 528 U.S. 1155 (2000); *Singleton v. Cecil*, 133 F.3d 631 (8th Cir.), *rev'd on other grounds*, 155 F.3d 983 (8th Cir. 1998); *Hodge v. Jones*, 31 F.3d 157 (4th Cir.), *cert. denied*, 513 U.S. 1018 (1994). *Doe v. Louisiana*, 2 F.3d 1412 (5th Cir. 1993); *Griffin v. Strong*, 983 F.2d

1544 (10th Cir. 1993); and *Frazier v. Bailey*, 957 F.2d 920 (1st Cir. 1992).

These decisions, however, identified specific limitations on the circumstances under which government officials might run afoul of the constitutional right to intimate association. These cases also recognized the difficulties inherent in balancing legitimate governmental interests against significant personal liberty interests. As a result, the constitutional right to family integrity was recognized only, at the time of the conduct in issue here, to be a "nebulous" one. *Hughes v. City of North Olmstead*, 93 F.3d 238, 243 (6th Cir. 1996); *Hodge*, 31 F.3d at 164; *Doe v. Louisiana*, 2 F.3d at 1418. Nevertheless, in the *Patel* decision, the Second Circuit obliterated these limitations, thus substantially broadening – virtually limitlessly – the scope of potential police liability.

In *Pittsley v. Warish*, 927 F.2d 3, 8 (1st Cir.), *cert. denied*, 502 U.S. 879 (1991), for example, the court noted that most courts which had then recognized a protected right to familial association "have done so only where the plaintiffs have alleged a permanent, physical loss of association of an immediate family member as a result of unlawful state action." This precept found support in *Santosky's* holding that a state cannot permanently sever the parent child relationship without due process. 455 U.S. at 754. *C.f., Harbury*, 233 F.3d at 606-06; *Brokaw*, 235 F.3d 1000 at 1018-19 (physical removal of child and enforced four month separation).

In *Patel*, the court of appeals held that it was "sufficient to invoke plaintiff's right to intimate association" that plaintiff alleged merely that petitioner Swanson "gave his wife false and defamatory information about him". *Patel*, 305 F.3d at 136. So too, the court below found sufficient to implicate the constitutional right Patel's claim that he

had been "ostracized from the majority of his family and friends". *Id.* at 134.

Other circuits have held that, in order to implicate the right to intimate association, the state action must be "directly aimed at the parent-child relationships." *Pittsley*, 927 F.3d at 8. *C.f., Rucker v. Harford County*, 946 F.2d 278 (4th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992). In *Ortiz v. Burgos*, for example, the First Circuit held that the stepfather and siblings of a prisoner beaten to death had no cause of action for loss of familial association, because the beating was not specifically intended to deprive them of their association with decedent. 870 F.2d 6, 8 (1st Cir. 1986). Again, this limitation on the contours of the right found support from this Court. *See Lyng v. Intn'l Union, United Aerospace, & Agric. Implement Workers of Am.*, 485 U.S. 360, 365-66 (1988) (applying direct and substantial interference standard to right of family association). Indeed, in a recent review of this Court's decisions, the District of Columbia Circuit observed that this Court "has found a constitutional right to continuing association with family members only in cases involving direct purposeful interference with familial relationships." *Harbury*, 233 F.3d at 605 (also noting split among circuits as to whether direct, intentional interference required).

In *Patel*, the Second Circuit expressly declined to adopt, and implicitly rejected, the "directly aimed at" standard. 305 F.3d at 137. The court ruled that allegations of a so-called "misinformation campaign", or "lies and chicanery" (characterizations hardly supported on the facts of this case), even though specifically intended to advance a criminal investigation and not solely for the purpose of interfering with respondent's relationships, stated a constitutional violation. *Id.*

Various of the other circuits have also found that the right of intimate association is specific to the

most nuclear of family relationships: parent-child and husband-wife, in particular. *E.g., Harbury*, 233 F.3d at 604-05; *Hodge*, 31 F.3d at 163; *Bell v. City of Milwaukee*, 746 F.2d 1205, 1242-48 (7th Cir. 1984) (father, but not siblings, had constitutional claim in death of son).

In *Patel*, the Second Circuit declined to limit the reach of the alleged constitutional violation to family members identified by the specific factors considered as significant in *Roberts*, such as co-habitation. 305 F.3d at 137. *C.f., Moore v. City of East Cleveland*, 431 U.S. 494, 504 (1977) ("sharing a household" a consideration in assessing appropriate constitutional protections). Instead, the court recognized only a "sliding scale" established by *Roberts*, which in this instance encompassed relatives with whom respondent had never resided. *Id.*[2] As to the entire undefined group of relatives asserted by respondent to have been affected by petitioners' actions, the court assumed the highest level of constitutional protection was warranted. *Id.* Indeed, far from undertaking the difficult task of defining the parameters of a family; *Wooley v. Baton Rouge*, 211 F.3d 913, 920 (5th Cir. 2000); the court declined to rule out the application of the right to those persons who were merely "friends". *Patel.*, 305 F.3d at 136.

In all these respects, the *Patel* opinion constitutes a departure from the decisions of other circuits which have addressed the right in issue. Most significantly, though, the court applied that right so as to limit police investigative conduct as never before, to establish a new minimum of required impact on the relationship at issue, and to reach a broader, more attenuated class of associates, than has any circuit before this time. There can be no serious question but that the court of appeals' decision in this case

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[2] Some of the practical difficulties of this "sliding scale" approach for law enforcement are discussed *infra*.

represents a quantum expansion of the constitutional right to intimate association. This Court should, it is respectfully suggested, consider whether that expansion into this arena is warranted and wise.

III. The Amorphous Analysis Of The *Patel* Decision Leaves Police Officers With No Guidance And No Zone Of Protection As To The Lawfulness Of Investigative Techniques Where Family Members Are Involved.

Perhaps the single most important reason for the granting of petitioners' writ – aside from the unjustifiable personal liability exposure to petitioners themselves – is the significant, practical impact of the *Patel* opinion on law enforcement investigative personnel, at least in the Second Circuit. It is not an overstatement to assert that the difficulties created for law enforcement by this decision are potentially enormous.

A. In denying qualified immunity to petitioners despite the admitted absence of clearly established law, the court of appeals vaporized this Court's binding and eminently necessary mandate of "fair notice" to law enforcement officials, and protection from liability where there is no such guidance. The reminder in *Hope* that even "novel factual circumstances" may still engender liability does not alter this reality. 122 S.Ct. at 2516. The court of appeals pronouncement that this respondent had alleged "sufficiently serious misconduct" to deny immunity, without a single, even remotely analogous case to buttress that conclusion, amounts to no guidance to law enforcement whatsoever.

Particularly is this so in view of the nature of the conduct alleged, and what is not alleged. There is no claim here of torture and murder, as in *Harbury*. There is no claim of any physical coercion whatsoever. There is no claim of a physical separation of any duration among these family members (aside from

respondent's elective move to another state). There is no claim of grueling interrogation of unreasonably extended duration. There is no complaint about so much as rudeness during an interview.

At the worst, respondent has alleged three instances of the dissemination of false information about him. (Not surprisingly, he included in his Amended Complaint counts alleging defamation under state law.) And, as discussed *supra*, in at least two of those instances the communication unarguably constituted no more than an expression of the investigator's opinion, that respondent was a suspect and might be dangerous.

The only factor distinguishing these alleged actions from traditional state law tort theories of action for defamation, is the focus on publication of the information to members of respondent's family. It is solely on this basis that respondent finds a constitutional thread from which to hang his federal causes of action. In this respect, the Second Circuit has departed as well from the teachings of *Paul v. Davis*, 424 U.S. 693, 712 (1976), that mere defamation – in that case a former public employee – does not alone deprive an individual of a liberty interest protected by the constitution.

B. Moreover, the *Patel* decision extends the reach of the constitutional right to intimate association to potentially preclude a breathtaking array of police investigative conduct. Although the court of appeals was apparently displeased with the "serious misconduct" it found here, the fact remains that the constitutionally-approved arsenal of police investigators includes a variety of "ploys", "artifices" or "tricks". *C.f.*, *Whittington v. State*, Md. Ct. Spec. App. No. 1143-2001 (October 31, 2002) (use of "bogus scientific procedures" and other trickery not sufficient to void confession); *Finke v. State*, 56 Md. App. 450 (Md. Ct. Spec. App. 1984) (no constitutional prohibition on falsely telling suspect his accomplice

has confessed). *See also, State v. LaPointe*, 237 Conn. 694, 705 n. 16 (1996) (noting use of "props" designed to mislead murder suspect).

Indeed, while the panel below apparently deplored the use of such investigative "chicanery", it neither discussed nor identified any specific prior constitutional restriction on police tactics which involved such conduct at the investigative stage.[3] Nor have petitioners discovered any such cases predating the police conduct in issue here. *C.f., Griffin v. Strong*, 983 F.2d 1544 (10th Cir. 1993) (finding no constitutional violation where police officer lied to wife about husband's confession to child abuse and encouraged her to start her life over without her husband).

C. Significantly, the *Patel* decision extended these prohibitions to investigative conduct never before found subject to constitutional restriction, solely because it involved members of respondent's family. In doing so, the court of appeals overlooked completely the inevitable effects on even the most routine of law enforcement investigations.

The undeniable effect of *Patel* is to create, in the Second Circuit, two classes of persons with whom the police must interact: family members and non-family members. Tactics traditionally found to pass constitutional muster when utilized with persons who are not family members, may now be deemed "sufficiently serious misconduct" to warrant liability when relatives are involved. Thus, for example, falsely telling a suspect his accomplice has confessed to a crime may now engender civil liability, if the suspect

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[3] The court's reference to *Ricciuti v. New York City Transit Auth.*, 124 F.3d 123 (2d Cir. 1997); *Patel*, 305 F.3d, at 140; does not change the equation. The complaint in that case was that officers had allegedly fabricated a confession by the suspect and forwarded it to a prosecutor, resulting in the plaintiff's arrest. The obvious Fourth Amendment violation implicated by such conduct does not approach the facts of this case.

and accomplice are close enough in consanguinity. The range of potentially prohibited investigatory tactics is simply unknowable – but only if family members are involved.

Nor is there any "logical stopping place" for these claims, based upon the degree or severity of impact on the relationship. *Trujillo v. Bd. of County Commr's.*, 768 F.2d 1186, 1190 (10th Cir. 1985). If, as *Patel* holds, police "misconduct" causing no more impact on familial relations than the claimed "ostracizing" of respondent Patel is sufficient to engender constitutional liability, the range of possible unconstitutional conduct – provided only that it impacts family members – has no foreseeable limits. Unless investigators are completely straightforward and candid, any negative emotional or psychological effects upon relatives may support a cause of action.

As a practical matter, in the aftermath of *Patel*, law enforcement officials will be obliged to ascertain from every person they deal with whether there is kinship to the suspect, and in what degree, and structure accordingly their interactions with complain-ants, witnesses, neighbors, informants and all other persons they may contact in the course of an investigation. They certainly must not, for fear of personal federal civil rights liability, say something inaccurately derogatory about a suspect – at least not to a relative.

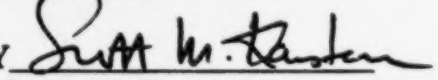
As prophetically noted by two district courts, "[t]he implications of recognizing such a generalized right to contest indirect state action having an incidental effect upon familial association ... are far-reaching, and cannot be overlooked by this Court." *Norton v. Cobb*, 744 F.Supp. 798, 802 (N.D. Ohio 1990), quoting *Willard v. City of Myrtle Beach*, 728 F.Supp. 397, 404 (D.S.C. 1989).

It is suggested with the greatest possible respect that they should not be overlooked by this Court, either.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

PETITIONERS, KEVIN SEARLES and DEBRA SWANSON

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2001
(Argued December 12, 2001 Decided: September 30, 2002)
(Errata Filed: October 16, 2002)
Docket No. 00-9552

JATIN PATEL,
Plaintiff-Appellee,
v.
KEVIN SEARLES and DEBRA SWANSON,
Defendants-Appellants.

Before:

CARDAMONE, POOLER, and B.D. PARKER, Jr., *Circuit Judges.*

Interlocutory appeal from a ruling dated November 14, 2000 of the United States District Court for the District of Connecticut (Underhill, J.) denying defendants' motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). The district court denied, *inter alia*, defendants' qualified immunity defense to plaintiff's 42 U.S.C. §1983 action for alleged violations of his constitutional right to intimate association.

Affirmed.

SCOTT M. KARSTEN, West Hartford, Connecticut (Sack, Spector & Karsten,

LLP, West Hartford, Connecticut, of counsel), *for Defendants-Appellants.*

JON L. SCHOENHORN, Hartford, Connecticut (Schoenhorn & Associates, Hartford, Connecticut, of counsel), *for Plaintiff-Appellee.*

CARDAMONE, *Circuit Judge*:

This appeal deals with the constitutional right of intimate association. Although clearly recognized in a general way by the Supreme Court and in scholarly writings, all of its boundaries have not yet been fixed. We think it unnecessary for our purposes to attempt to fully remedy that lack. Like the wind that blows where it wills and can be heard, yet no one knows "from where it cometh and whither it goeth" John 3:8, this constitutional right is real despite the lack of exact knowledge regarding its derivation and contours.

Plaintiff Jatin Patel sued defendants Kevin Searles, Chief of Police for the Town of Windsor, Connecticut, and Debra Swanson, a detective for the same town, pursuant to 42 U.S.C. §1983, seeking compensatory and punitive damages for alleged violations of his constitutional right to intimate association. Plaintiff also asserted state common law causes of action and, in an amended complaint, a substantive due process claim of defamation under the Fourteenth Amendment. We have before us an interlocutory appeal from a decision and order of the United States District Court for the District of Connecticut (Underhill, J.), dated November 14, 2000, denying defendants' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). *See Patel v. Searles*, No. Civ.A. 3:99CV1230SRU, 2000 WL 1731338 (D. Conn. Nov. 14, 2000). We have jurisdiction to hear this interlocutory appeal under the

collateral order doctrine. *See Locurto v. Safir*, 264 F.3d 154, 162 (2d Cir. 2001).

In moving for Rule 12(c) judgment on the pleadings, defendants contended that they are entitled to qualified immunity protecting them from suit on the constitutional claims Patel alleged and that no basis exists for the asserted supplemental state common law claims. In denying defendants' motion, the district court held that plaintiff had stated a cognizable claim for the violation of his constitutional right to intimate association, and that the state law claims were sufficient on their face. The court did not address plaintiff's defamation claim. Defendants do not challenge on appeal the trial court's ruling with regard to the common law claims. Since we affirm with respect to the alleged violations of plaintiff's right to intimate association, we need not reach the defamation issue, and leave it therefore for the district court to decide in the first instance.

BACKGROUND

Because we are faced with a motion for judgment on the pleadings, we accept the allegations in the amended complaint as true and construe them in the light most favorable to the plaintiff. *King v. Am. Airlines, Inc.*, 284 F.3d 352, 355 (2d Cir. 2002). Those allegations describe the circumstances in which this case arises as follows: on March 21, 1996 the plaintiff's mother and sister, Champa and Anita Patel, were found murdered in their home in the Town of Windsor, Connecticut. Under the direction of Chief Searles, Detective Swanson began investigating this crime. After two months of police work, Swanson had not uncovered sufficient evidence to arrest a suspect. Frustrated by the lack of progress, defendants allegedly focused the criminal inquiry on plaintiff by concocting and disseminating false evidence about him. The officers' intention, according to Patel, was to

create hostility and mistrust among the members of his family towards him with the hope that the resulting animosity would produce accusations against him.

Specifically, the complaint asserts that the officers began their scheme in April or May 1996 when one or both of them drafted fake confession letters blaming plaintiff's cousin for the deaths. They mailed the fake letters to two daily newspapers and to plaintiff's father, falsely claiming they came from plaintiff's typewriter. Further, a year later, the officers drafted and disseminated a memorandum that listed the reasons the police suspected plaintiff committed the murders. This memorandum, as summarized in the amended complaint, allegedly contained the following four falsehoods:

> a. That a "rift" between the plaintiff and his deceased sister [Anita] was "so severe" that the plaintiff's niece (Anita's daughter) "would not recognize" him. This falsehood is significant because the plaintiff's niece was an eyewitness to the murders, who told investigators that she did not recognize the perpetrator;
>
> b. That the plaintiff's "net worth plummeted from approximately $300,000 in 1995 to $32,000 in April 1996;"
>
> c. That the plaintiff failed a polygraph test and then refused to take further tests;
>
> d. That the defendant [plaintiff] "refused to grant further interviews to answer still open questions."

In November 1997, still without any real leads, Detective Swanson traveled to Tennessee, where Patel had moved as a result, he said, of the officers' actions. There she delivered a handwritten letter to, among others, plaintiff's wife. In the letter, Swanson again falsely accused Patel of the brutal torture and murder of his mother and sister, and further related that Patel was leading a double life - one that Seema, his wife, would likely be the last to know about. For this reason, Swanson stated, Seema and her children's lives were in danger, as Patel "could reach 'that point of anger again.'"

Patel declares that because of defendants' conduct he has been completely ostracized from the majority of his family and friends. For example, he states that his siblings and father refuse even to talk to him. Moreover, he contends these actions by defendants forced him to leave his former employment and home in Connecticut. In sum, plaintiff insists defendants Searle and Swanson acted dishonestly and recklessly, leading to the complete destruction of his family and community life.

DISCUSSION

I Standard of Review

We review the district court's denial of defendants' motion to dismiss on the pleadings *de novo*, *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994), accepting the allegations in the amended complaint as true and drawing all reasonable inferences in favor of the nonmoving party, here the plaintiff. *D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93, 99 (2d Cir.), *cert. denied*, 122 S. Ct. 666 (2001). A complaint will only be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Moreover, where the complaint alleges a civil rights violation, we apply this standard with particular strictness. *Sheppard*, 18 F.3d at 150.

II Constitutional Right to Intimate Association

As stated, plaintiff avers defendants violated his constitutional right to intimate association and that they are thereby subject to liability under 42 U.S.C. §1983. This civil rights law provides a cause of action to individuals who have been deprived by government officials acting under color of law "of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. §1983; *see Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 250 (2d Cir. 2001). Defendants respond that they are entitled to judgment on the basis of the affirmative defense of qualified immunity. This defense shields government actors from liability if they did not violate clearly established law, or if it was objectively reasonable for such actors to believe that their actions did not violate clearly established law. *Salim v. Proulx*, 93 F.3d 86, 89 (2d Cir. 1996); *see Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987).

We proceed in two steps. First, we address the threshold question of whether the amended complaint alleges the deprivation of an actual constitutional right. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). If it does, we then decide whether the right was clearly established at the time of the officers' alleged misdeeds. *Id.* "'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Id.* at 614-15 (alterations in original).

A. *Recognition of Such Right*

Defendants concede that the Constitution in at least some circumstances protects familial relationships from unwarranted government interference. This protection derives, in part, from a broader constitutional right to association. *See Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). In *Roberts*, the Supreme Court addressed the right to association in two forms: freedom of expressive association and freedom of intimate association. With regard to the latter right, which is the one at issue in this case, the Supreme Court stated such a right is constitutionally protected "as a fundamental element of personal liberty." *Id.* at 618. For this proposition it cited a number of substantive due process cases, and noted its long tradition of affording "highly personal relationships a substantial measure of sanctuary from unjustified interference by the State." *Id.* at 618-19; *see also Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 103 (2d Cir. 1999) ("'parent's interest in the custody of a child [is] a constitutionally protected liberty interest subject to due process protection'" (alteration in original)); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624 (1980) (providing the first discussion of a right to intimate association).

B. *The Family Relationship Alleged*

Since defendants concede a right to intimate association exists, the questions before us are whether the particular relationships at issue in this case are generally protected and, if so, whether they are protected under the circumstances alleged. With regard to the first question, defendants assert that Patel's amended complaint, which alleges that his relationships with his family and friends were impaired, implicates remarkably broad associational interests insupportable as federal claims under existing case law. Insofar as defendants complain that the right to intimate association does not protect

relationships between friends, we note that the district court concluded that plaintiff's papers had made clear he was only pursuing claims based upon his *familial* relations. *Patel*, 2000 WL 1731338, at *1 n.3. Thus, it is unnecessary to decide whether the right to intimate association extends to friendships as that question is not now before us.

Defendants also urge that plaintiff's complaint is too broad because it implicates all of the "various members of [his] family." *Roberts*, defendants assert, stated that relationships between members of a nuclear family deserve the most protection but that other relationships may not. *See* 468 U.S. at 618-20. To determine whether other familial relationships are protected, one must, according to this formulation, assess such factors as cohabitation and the precise degree of kinship. We agree that *Roberts* established a sliding scale for determining the amount of constitutional protection an association deserves, but we conclude that the relationships at issue in this case - those between Patel and his father, siblings, wife, and children - receive the greatest degree of protection because they are among the most intimate of relationships.

We say this because at this stage of the litigation all reasonable inferences must be drawn in favor of plaintiff's complaint. The husband/wife and parent/child relationships are obviously among the most intimate, and defendants do not suggest otherwise. Moreover, even though plaintiff did not live with his father and siblings, we must assume those relationships, too, were of such an intimate nature as to warrant the highest level of constitutional protection. *See Rivera v. Marcus*, 696 F.2d 1016, 1024-25 (2d Cir. 1982) (concluding that due process rights of half sister were violated when siblings were removed from her home).

III Defendants' Arguments Regarding Their Conduct

A. *Relationships' Impairment and Severity Questioned*

Although defendants concede plaintiff's right to intimate association exists, they maintain that plaintiff has not alleged his relations with his wife and children have been impaired by their conduct. To the contrary, the amended complaint makes several allegations specifically addressing those relationships. For instance, plaintiff alleges that Detective Swanson gave his wife false and defamatory information about him to make her fear for her own and her children's lives. According to Patel, this constituted part of the officers' strategy of creating sufficient hostility within his family in order to elicit false accusations against him. These allegations are sufficient to implicate plaintiff's right to intimate association. *See Adler v. Pataki*, 185 F.3d 35, 44 (2d Cir. 1999) (employee allegedly fired in retaliation for wife's discrimination suit could maintain §1983 action); *Griffin v. Strong*, 983 F.2d 1544, 1549 & n.5 (10th Cir. 1993) (police officer's lie to suspect's wife that her husband had confessed to child abuse implicated wife's associational rights).

Defendants next contend that the extent of the alleged interference with plaintiff's relationships, which they assert only resulted in ostracization, was not severe enough to warrant constitutional protection. Citing cases where plaintiffs have been completely or permanently deprived of their intimate relations, the officers insist that there is a minimum level of culpability to which their conduct does not rise. *See, e.g., Bell v. City of Milwaukee*, 746 F.2d 1205, 1244-45 (7th Cir. 1984) (holding parent's §1983 claim actionable when adult son killed); *Duchesne v. Sugarman*, 566 F.2d 817, 833 (2d Cir. 1977) (holding mother and children had actionable claim when state

removed children from home and refused to return them without due process of law).

We reject defendants' draconian and formalistic vision of how severe the impairment to the right to intimate association must be because, for one thing, it is not supported by the case law. Simply put, defendants' view is inconsistent with *Roberts*' statement that constitutional protections for associational interests are at their apogee when close family relationships are at issue. 468 U.S. at 619-20. Further, even less severe burdens than Patel has allegedly suffered have been held to implicate the right to intimate association. *See Adler*, 185 F.3d at 44 (holding that retaliatory dismissal is a sufficient burden on marital relationship to maintain §1983 action).

And, even if plaintiff were required to show a permanent deprivation of familial association, the district court properly ruled that plaintiff alleged facts sufficient to establish such a claim with regard to his father and siblings. Specifically, plaintiff alleged that defendants "extinguish[ed]" his familial relations. In this respect, plaintiff suggests the officers used their authority to interfere with his family relations in a particularly pernicious way: they attacked the relationships directly rather than simply erecting a legal barrier, such as a custody determination, to prevent contact between plaintiff and his family members. Given these considerations, defendants' argument that plaintiff's injuries were insufficient to implicate the right to intimate association is unpersuasive.

B. *Officers' Intent*

The officers' next argument - that there was no constitutional violation because the officers' actions were not "directed at" Patel's family relationships -

fares no better. First, this Circuit has never held that a challenged action must be directed at a protected relationship for it to infringe on the right to intimate association. *See id.* at 43-44. But, in any event, Patel has alleged facts sufficient to prove that the officers' conduct *was* intentionally directed at his family. For instance, Patel declares that the officers engaged in a misinformation campaign designed "to create hostility and mistrust among family members that would ultimately lead to false accusations against [Patel]." That is to say, in order to falsely implicate Patel as a murderer, the officers directly assaulted Patel's intimate family relations through lies and chicanery. Hence, even under the strict standard suggested by defendants - which we do not believe finds support in *Roberts* or in any of our precedents - plaintiff has alleged a constitutional violation.

C. *Governmental Interests*

Defendants next declare that Patel's right to intimate association is outweighed by legitimate governmental interests, namely, the investigatory necessities of a double homicide. With little or no physical evidence to aid their investigation, the officers warrant that they had a compelling and indisputably legitimate governmental interest in disrupting Patel's relations with his family.

In staking out this position, the officers rely heavily on *Griffin v. Strong*, 983 F.2d 1544 (10th Cir. 1993). In *Griffin*, a police officer who was investigating charges of child abuse falsely told a woman that her husband had confessed to the crime. *Id.* at 1548. To determine whether the lie constituted an impermissible infringement on the plaintiff's right to familial intimacy, the court used a balancing test. On the one hand, both the plaintiff and her husband had willingly spoken to the officer, and the officer's conduct involved neither physical coercion nor

behavior that shocked the conscience. *Id.* at 1548-49. But on the other hand, the officer lied about the plaintiff's *husband*, which the court believed "weigh[ed] on the side of an infringement of [her] associational rights." *Id.* at 1549 n.5. In the end, the court concluded that the balance tipped in favor of the officer, since the alleged infringement, taken in context, was only a "slight" one. *Id.* at 1549.

Insofar as it is appropriate to weigh the strength of plaintiff's associational rights against the defendants' behavior in the instant case, we think defendants are correct that the government's interest in solving the murders weighs in their favor. However, this particular proposition at this stage of the proceedings is ultimately of little value. Construing the facts in the light most favorable to plaintiff, there are few if any other facts that weigh on the side of defendants. There is only the bare assertion that the officers were conducting a murder investigation. We do not now know if their alleged attempts to destroy Patel's family were anything more than a fishing expedition; that is, they may have gone after Patel for no reason other than his relationship to the victims.

Further, even were we to adopt the balancing test used in *Griffin*, all of the factors that supported the defendant's position in that case would favor Patel at this early stage of the litigation. For example, Patel alleges that the impact of the lies on his family was devastating, not slight. While in *Griffin* the officer told a lie to the plaintiff in one consensual interview, the officers in this case engaged in a virtual campaign of misinformation. Not only did they lie to Patel's father, wife, and siblings, but they also published those falsehoods in local newspapers. Moreover, when Patel moved from Connecticut to Tennessee, Swanson followed him and allegedly continued these tactics.

Additionally, in the present case, defendants told members of Patel's family that he could kill them, and lied about the evidence linking Patel to the murders of his mother and sister. We believe therefore that the officers' conduct here is of a wholly different degree than the police conduct in *Griffin*. Accordingly, Patel's amended complaint adequately alleges a violation of his right to intimate association.

IV Qualified Immunity

Finally, we consider whether defendants are entitled to the protection of qualified immunity. That defense would come into play if, at the time of the alleged misconduct, defendants were not acting in violation of clearly established law. *Wilson*, 526 U.S. at 609. The defense applies if reasonable officials would not have understood that their actions, in the instant circumstances, violated plaintiff's right to intimate association. *See Anderson*, 483 U.S. at 640. Thus, for a court to withhold qualified immunity, the unlawfulness of the action must have been apparent in light of pre-existing law. *Id.*

We agree with the district court that at least the general right to intimate association has been clearly established since 1984 when *Roberts* was decided. *Patel*, 2000 WL 1731338, at *3. As noted, *Roberts* stated that the affiliations that "attend the creation and sustenance of a family" exemplify those personal attachments deserving the greatest degree of sanctuary from the state. 468 U.S. at 619. While the clearest instance of the right to familial association is embodied in the decades worth of authority protecting parents' custodial rights, *see Wilkinson*, 182 F.3d at 103-04, courts have not held, and defendants do not argue, that the constitutional protection for such relationships end when a child turns 18, *see, e.g.*, *Bell*, 746 F.2d at 1245 ("[W]e are unpersuaded that a constitutional line based solely on the age of the child

should be drawn. The Supreme Court's decisions protect more than the custody dimension of the parent-child relationship."); *see also Rivera*, 696 F.2d at 1025, 1028-29 (finding due process rights of a half sister were violated when siblings were removed from her home). Because *Roberts* explicitly stated that constitutional protection extended to the most intimate relationships, and because we assume on this appeal that plaintiff's relationships were intimate family relationships, we hold that the relationships at issue implicate the clearly established right to intimate association.

Having found that the right to intimate association extended to Patel's family relationships, we must still determine, in this specific factual context, whether defendants' actions violated a clearly established "constitutional right[ ] *of which a reasonable person would have known*." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (emphasis added). "An officer's actions are objectively reasonable if officers of reasonable competence could disagree on the legality of the defendants' actions." *Ford v. Moore*, 237 F.3d 156, 162 (2d Cir. 2001). In this regard, defendants point out that even in the more common fact pattern of a child abuse investigation, our precedents have not delineated the exact boundaries of associational rights, making it difficult for social workers to know when their actions are unconstitutional. *See Wilkinson*, 182 F.3d at 104 n.8. Similarly, since neither the Supreme Court nor this Court has ever ruled upon a fact pattern similar to the one now before us, the officers maintain that they, like the social workers in *Wilkinson*, had no reasonable basis to conclude that their alleged actions violated the Constitution.

Defendants' contentions are not without merit. Yet, at the pleading stage of this litigation, we are unable to conclude that it is "beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. Plaintiff has alleged sufficiently serious misconduct that were we to reverse the district court, it would be equivalent to holding that the right to intimate association does not impose any clearly established limits on the tactics that a police officer may use in the course of an investigation.

While we earlier acknowledged uncertainty as to the contours of the right in question, *Adler*, 185 F.3d at 42, a subject the district court will need to consider, that uncertainty does not extend so far as to suggest that a murder investigation erodes all of the "critical buffers between the individual and the power of the State." *Roberts*, 468 U.S. at 619. Embracing that view would render hollow the right to intimate association.

As a consequence, we do not think it would be objectively reasonable for the police to engage in an extended public and private defamatory misinformation campaign to destroy a family, hoping that those tactics *might* produce incriminating leads in a murder investigation. *See Wilkinson*, 182 F.3d at 104 (noting that courts have declined to impose restrictions on abuse investigations short of the extreme of manufacturing false evidence); *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 125 (2d Cir. 1997) ("Lying is wrong, and if the police lie while acting in their official capacity, they ... violate the public trust. Courts must ensure that such serious accusations receive appropriate scrutiny lest [we appear] to endorse such official misconduct, which would weaken the public's respect for the administration of justice."). In so holding, we do not set out an evidentiary threshold that plaintiff must reach to prevail on his §1983 claim.

CONCLUSION

Accordingly, we hold plaintiff has alleged facts sufficient to establish a constitutional violation of his right to intimate association. Further, that right was clearly established at the time of defendants' alleged conduct. The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JATIN PATEL	:	
v.	:	CIV. ACTION NO.
	:	3:99CV1230(SRU)
KEVIN SEARLES and DEBRA SWANSON	:	NOVEMBER 14, 2000

RULING ON DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Jatin Patel ("Patel") filed this action claiming that two police officers, Kevin Searles and Debra Swanson (the "Officers"), acted improperly in investigating the homicides of Patel's mother and sister. The Officers have filed a Motion for Judgment on the Pleadings pursuant to Federal Rule of Civil Procedure 12(c), arguing that Patel "cannot establish the deprivation of any federal constitutional or statutory right," that the Officers are entitled to qualified immunity for Patel's constitutional claims, and that "there exists no basis for liability as to [Patel's] supplemental state law claims." (Pl's Motion at 1.) Patel opposes the Officers' motion and argues that he has properly set forth claims for the Officers' alleged violation of his constitutional rights and for violations of state common law. Patel further argues that the Officers are not entitled to qualified immunity from his constitutional claims.

For the following reasons, Patel has stated a cognizable claim for violation of his constitutional right to intimate association with his family and the Officers are not entitled to qualified immunity from that claim. In addition, the Officers are not entitled to judgment on the pleadings with respect to Patel's state

law claims because the Officers rely solely on matters outside the pleadings to attack those claims.

I. STANDARD FOR RULE 12(C) MOTION[1]

"The test for evaluating a 12(c) motion is the same as that applicable to a motion to dismiss under Fed. R. Civ. Proc. 12(b)(6)." Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 644 (2d Cir.1998). The court must therefore accept the allegations of the complaint as true, and draw all reasonable inferences in the plaintiff's favor. Id. Dismissal is appropriate only if "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (internal quotations omitted). "The standard is applied with particular strictness where the plaintiff complains of a civil rights violation." Id. (internal quotations and citations omitted).

II. DISCUSSION

A. Patel has pled a violation of his constitutional right to intimate association.

The Officers first argue that the complaint fails to state a cognizable federal claim. The Officers concede that the federal courts recognize a constitutional right to family integrity, but argue that that constitutional right protects only relationships with cohabitating family members. The Officers argue that Patel has therefore failed to state a federal claim because, instead of limiting his claim to immediate, cohabitating, family members, he expansively alleges that the he has been improperly "ostracized from the majority of his family and friends." (Pl's Memo. at 5.)

There can be no serious dispute that Patel has alleged that the Officers interfered with his relations

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[1] The Officers urge the consideration of matters outside the pleadings and the treatment of their motion as one filed under > Rule 56 of the Federal Rules of Civil Procedure. The court declines their invitation for the reasons stated in its January 6, 2000 Ruling on the Defendant's Motion to Stay Discovery.

with his family. Patel alleges that the Officers engaged in a wrongful campaign to "create hostility and mistrust among family members that would ultimately lead to false accusations against the plaintiff" (Compl.P 8)[2], and that the Officers' campaign resulted "in a division in the plaintiff's family, with the consequence that the plaintiff was and remains ostracized from the majority of his family and friends."[3] (Id. P 53.) More specifically, Patel claims that the Officers mailed fictitious confession letters to his father, circulated a defamatory memorandum naming him as a suspect in the homicides to various members of his family, and sent a defamatory and disparaging letter to his wife. (Id. PP 9-13.)

Patel's claims are not deficient simply because he has not alleged that he cohabitated with the family members from whom he is now ostracized. Although cohabitation with one's relatives is one factor used to determine whether a particular familial relationship will be afforded constitutional protection, so too are marriage, childbirth, and the raising and education of children. Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984). In fact, beyond even traditional nuclear family

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[2] All citations to the complaint refer to the May 18, 2000 Amended Complaint. Although the present motion was filed before the amendment of the complaint, the court will treat the motion as if it were directed at the latest version of the complaint.

[3] Although Patel alleges that the Officers' conduct caused him to become ostracized from his friends as well as his family, it is clear from a reading of the complaint and Patel's memorandum of law in opposition to the Officers' motion, that he claims only a violation of the constitutional right to intimate association with his family, not the violation of any purported right to intimate association with his friends. (See, e.g., Pl's Memo. at 8 ("The actions of the defendants destroyed the plaintiff's family associations and were directly aimed at interfering with his marital relationship.")) The court therefore does not decide where Patel's alleged friendships would fall on the spectrum of intimate associations outlined in Roberts or, therefore, whether the Officers would be entitled to qualified immunity for a claimed interference with his friendships.

relations "lies a broad range of human relationships that may make greater or lesser claims to constitutional protection from particular incursions by the State." Id. The Officers' attempt to limit Patel's constitutional right to association with his cohabitating relatives is thus misplaced. See also Sanitation & Recycling Indus. Inc. v. City of New York, 107 F.3d 985, 996 (2d Cir.1997) (statute did not improperly infringe associational rights where, *inter alia*, it was "not intended to prohibit family associations or social contacts ..." unrelated to prohibited conduct); Griffin v. Strong, 983 F.2d 1544, 1549 n. 5 (10 th Cir.1993) (Lying to one spouse during child abuse investigation "weighs on the side of an infringement of [the plaintiff's] associational rights" where it could "impact the marital relationship.").

The Officers further argue that Patel has failed to state a cognizable federal claim because he has not alleged that he was completely deprived of the ability to associate with his family. Rather, the Officers argue, he has merely alleged that relations with his family have been impaired. While some courts have held that state interference is actionable only if it results in permanent physical separation, that requirement has not been adopted in this Circuit. Dusenbury v. City of New York, No. 97 CIV. 5215(HB), 1999 WL 199072 at *2 (S.D.N.Y. Apr. 9, 1999). Even if, that were the rule in this Circuit, however, the Officers' argument fails. Patel has alleged that the Officers' conduct caused "a division in the plaintiff's family, with the consequence that [he] was and remains ostracized from the majority of his family and friends." (Compl. P 53). This allegation is sufficient to permit proof that Patel has been completely separated from certain family members.

Finally, the Officers argue that Patel's constitutional claim is deficient because it does not contain an allegation that the Officers intended their improper conduct to affect Patel's family relationships. The court assumes, without deciding, that Patel must

demonstrate that the Officers intended their conduct to affect his right to intimate association. See, e.g., Adler v. Pataki, 185 F.3d 35, 43-44 (2d Cir.1999) (noting, without deciding, that "[s]ometimes court opinions suggest that an intimate association right is not violated unless the challenged action has the likely effect of ending the protected relationship, or unless affecting the relationship was the purpose of the challenged regulation ... [but] other cases ... consider whether the challenged action ... is arbitrary or an undue intrusion by the state ....") (citations omitted). The Officers' argument fails nonetheless because Patel has sufficiently alleged that the Officers' actions were directed at his family. For example, Patel alleges that the Officers engaged in a concerted "effort to create hostility and mistrust among [Patel's] family members that would ultimately lead to false accusations against [Patel]." (Compl. P 8.) The complaint also alleges that the defamatory memorandum that names Patel as a murder suspect was "prepared specifically with the understanding and intention that it would be published and distributed to various members of [Patel's] family...." (Id. P 10.) Patel has therefore stated a cognizable claim for violation of his constitutional right to intimate association with his family.

B. The Officers are not entitled to qualified immunity from Patel's constitutional claim.

The Officers argue that they are entitled to qualified immunity from Patel's claim of interference with his right to associate with his family because that right was not clearly established in this Circuit at the time of the alleged violation. "In order to determine whether a particular right was clearly established at the time a defendant acted, a court should consider: (1) whether the right in question was defined with 'reasonable specificity'; (2) whether the decisional law of the Supreme Court and the applicable circuit court

support the existence of the right in question; and (3) whether under preexisting law a reasonable defendant official would have understood that his or her acts were unlawful." Frank v. Relin, 1 F.3d 1317, 1328 (2d Cir.1993), *cert. denied*, 503 U.S. 962 (1992).

The right to intimate association has been defined with specificity at least since 1984, when the Supreme Court issued the Roberts decision. That decision not only establishes "a spectrum from the most intimate to the most attenuated of personal attachments," and provides a set of factors for placing specific relations along the spectrum (i.e., size, purpose, policies, selectivity, and congeniality), but also unequivocally places family relationships at the polar extreme of the most intimate and therefore most protected relations. Roberts v. U.S. Jaycees, 468 U.S. at 622. Thus, with respect to Patel's allegations concerning interference with his family relationships, the right at issue was clearly defined with reasonable specificity at the time of the Officer's investigation.

The Officers alternatively argue that, even if the right was clearly established, it was objectively reasonable for them to believe that their actions did not violate Patel's federal rights. Public officials, such as the Officers, seeking to establish qualified immunity must show that "reasonable persons in their position would not have understood that their conduct was within the scope of the established prohibition." Williams v. Greifinger, 97 F.3d 699, 703 (2d Cir.1996). The Officers simply can not, without the court considering matters outside the pleadings, demonstrate that a reasonable police officer would not have known that mailing fictitious confession letters to Patel's father, circulating a defamatory memorandum naming Patel as a suspect to members of his family, and sending a defamatory and disparaging letter to Patel's wife, would improperly interfere with Patel's constitutional right to intimate association with his family.

C. Patel's state law claims are not deficient on their face.

The Officers argue that Patel's libel claim is barred by the two-year limitations period provided in Connecticut General Statutes Section 52-597. They also argue that the alleged statements in the memorandum naming Patel as a suspect in the homicides were non-defamatory and non-actionable because the statements either were true or were defendant Searles' opinions. Finally, the Officers argue that Patel's invasion of privacy claim is based solely on the alleged defamatory statements and therefore must fail for the same reasons that his libel claim fails.

In support of their arguments, the Officers rely on the Affidavit of Debra Swanson and the allegedly defamatory memorandum. In its January 6, 2000 Ruling on the Defendant's Motion to Stay Discovery the court excluded matters outside the pleadings from consideration of the Officers' present motion pursuant to Rule 12(c). The Officers' attack on Patel's state law claims thus fails because it is based solely on matters outside the pleadings.

III. CONCLUSION

For the foregoing reasons, the Officer's Motion for Judgment on the Pleadings (doc. # 15) is denied.

It is so ordered.

Dated at Bridgeport, this 14th day of November, 2000.

/s/

Stefan R. Underhill

United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JATIN PATEL	:	CIVIL ACTION
Plaintiff	:	
	:	
VS. :	:	NO:3:99CV1230 (SRU)
	:	
KEVIN SEARLES AND	:	
DEBRA SWANSON	:	
Defendants	:	MAY 18, 2000

AMENDED COMPLAINT

I. PRELIMINARY STATEMENT

1. This is a civil rights action brought pursuant to Title 42 U.S.C. §1983 and state common law for monetary and declaratory relief against a police detective and the current Windsor Chief of Police, who libeled the plaintiff by publicly declaring him to be the "chief suspect" in a double homicide, and conspired to deprive the plaintiff of his first, fifth, ninth, and fourteenth amendment rights under the United States Constitution.

II. JURISDICTION

2. This action is brought pursuant to Title 42, United States Code §§1983 and 1988, and the first, fifth, ninth and fourteenth amendments to the United States Constitution, and statutory law pursuant to 28 U.S.C. §1331.

III. PARTIES

3. The plaintiff, Jatin M. Patel, is a citizen of the United States and currently a resident of Hendersonville, Tennessee. At various times relevant to this complaint, the plaintiff was a resident of either Farmington, Connecticut or Hendersonville, Tennessee.

4. At all times relevant to this complaint, the defendant, Kevin Searles (hereinafter "defendant Searles"), was and is employed as the chief of police of the Town of Windsor, Connecticut, a municipal corporation incorporated under the laws of the State of Connecticut. He is being sued in his individual capacity.

5. At all times relevant to this complaint, the defendant, Debra Swanson (hereinafter "defendant Swanson") was and is employed as a detective for the police department of the Town of Windsor, Connecticut. She is being sued in her individual capacity.

IV. FACTS

6. On or about March 21, 1996, Champa Patel and Anita Patel, the mother and sister of the plaintiff, respectively, were found murdered in their home on Massow Lane in Windsor. Immediately after the bodies were discovered, the Windsor Police, under the direction of defendant Searles and through the investigating efforts of defendant Swanson, commenced a criminal investigation of the deaths in an attempt to solve the murders, and identify and arrest one or more potential suspects.

7. After about two months of unsuccessful investigatory efforts, the defendants were unable to obtain sufficient information to seek the arrest of any suspect. As a result, the defendants were frustrated because they were unable to solve the crime.

8. In an effort to falsely place blame for the murders on the plaintiff or other members of his family, the defendants agreed to concoct and disseminate false evidence in an effort to create hostility and mistrust among family members that would ultimately lead to false accusations against the plaintiff.

9. For example, through information and belief, the defendants, either jointly or severally, created phony "confession" letters in April or May or 1996,

that purportedly accused the plaintiff's cousin for the deaths, and then mailed these fictitious letters to two daily newspapers and the plaintiff's father. The defendants then falsely suggested that the letters were possibly typed on the plaintiff's typewriter.

10. On or about June 9, 1997, defendant Swanson, in conjunction with defendant Searles, prepared and disseminated a memorandum entitled "Jatin Patel as a Suspect" (hereinafter referred to as the "Swanson memorandum.") This document, which was not typed on any official police forms, was prepared expressly for the purpose of responding to family members' inquiries concerning the department's labeling of the plaintiff as a suspect in the homicides. It was also prepared specifically with the understanding and intention that it would be published and distributed to various members of the plaintiff's family and, ultimately in 1998, to the news media.

11. The Swanson memorandum contained several material misstatements of fact that were either false or recklessly disregarded the truth, with the direct consequence of defaming and disparaging the plaintiff. These false or reckless statements included the following:

a. That a "rift" between the plaintiff and his deceased sister was "so severe" that the plaintiff's niece (Anita's daughter) "would not recognize" him. This falsehood is significant because the plaintiff's niece was an eyewitness to the murders, who told investigators that she did not recognize the perpetrator;

b. That the plaintiff's "net worth plummeted from approximately $300, 000 in 1995 to $32,000 in April 1996;"

c. That the plaintiff failed a polygraph test and then refused to take further tests;

d. That the defendant "refused to grant further interviews to answer still open questions."

12. On or about November 6, 1997, defendant Swanson drafted a hand-written letter and published it to the defendant's wife and others, falsely accusing the plaintiff of causing "the brutal torture and murder of two other women;" falsely stating that the plaintiff could reach "that point of anger again" and murder his own wife and children; and falsely stating that the plaintiff's "double life is responsible for" the murders.

13. The statements made by defendant Swanson, acting alone or jointly with the approval and knowledge of defendant Searles, were, in fact, false and defamatory. Said statements were of the type and nature as to excite adverse, derogatory and/or unpleasant feelings or opinions about the plaintiff.

V. FIRST COUNT (LIBEL)

14. As a direct result of the publication of the aforedescribed statements and other similar statements, the plaintiff suffered emotional distress due to diminished esteem, respect, good will and/or confidence in him in the community.

VI. SECOND COUNT (INVASION OF PRIVACY)

15. Paragraphs 1 through 13 of the First Count are hereby realleged as Paragraphs 16 through 29 of the Second Count, as if fully set forth herein.

30. In addition to the aforesaid, the defendants, acting jointly, also published to the plaintiff's family and members of the community on or about June 9, 1997 certain private details about the plaintiff's financial records and his friendships with other women, including details of his relationships that predated his marriage to his present wife, in order to place the plaintiff in a false light in the public's opinion.

31. The nature, extent and type of publicity generated by the defendants against the plaintiff was such that it would likely be highly objectionable to an ordinary

reasonable person and therefore constituted an invasion of personal privacy.

32. The plaintiff suffered damages as a direct consequence of the acts of the defendants.

VII. THIRD COUNT (VIOLATION OF CIVIL RIGHTS)

33. Paragraphs 1 through 13 of the First Count are hereby realleged as Paragraphs 34 through 47 of the Third Count, as if fully set forth herein.

48. Paragraphs 30 through 32 of the Second Count are hereby realleged as Paragraphs 49 through 51 of this Third Count, as if fully set forth herein.

52. At all relevant times, the defendants were acting, separately and jointly, under color of state law, regulation and/or custom, and under color of their authority as municipal police employees of the Town of Windsor, Connecticut.

53. The actions of the defendants resulted in a division in the plaintiff's family, with the consequence that the plaintiff was and remains ostracized from the majority of his family and friends.

54. The actions of the defendants violated the constitutional rights of the plaintiff in one or more of the following ways:

a. The right of association and familial integrity and relationships, in violation of the first and ninth amendments to the United States Constitution; and

b. The right not to suffer loss of liberty interests including the extinguishing of familial affection, contact and relationships, without due process of law,

in violation of the fourteenth amendment to the United States Constitution.

55. As a result of the defendants' actions, the plaintiff suffered damages as aforesaid.

VIII. FOURTH COUNT (STIGMA PLUS)

56. Paragraphs 1 through 13 are hereby realleged as paragraphs 57 through 70 of the Fourth Count, as if fully set forth herein.

71. Paragraphs 30 through 32 are hereby realleged as paragraphs 72 through 74 of the Fourth Count, as if fully set forth herein.

75. Paragraphs 52 through 55 are hereby realleged as paragraphs 76 through 79 of the Fourth Count, as if fully set forth herein.

80. The direct actions of the defendants caused the plaintiff's siblings and father to stop talking with the plaintiff, thereby completely destroying the plaintiff's familial relationships.

81. The direct actions of the defendants forced the plaintiff to leave his employment.

82. The direct actions of the defendants forced the plaintiff to move his residence to another state.

83. The direct actions of the defendants defamed the plaintiff by attaching a stigma to his reputation which caused the complete destruction of the plaintiff's familial relationships, right to continue his employment and right to continue to reside in the State of Connecticut, in violation of the plaintiff's constitutional rights pursuant to the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Title 42 U.S.C. §1983.

WHEREFORE, the plaintiff seeks the following:

1. Compensatory Damages;
2. Punitive or Exemplary Damages;
3. Attorney's Fees and Costs;
4. Such other relief as may be deemed proper and just by the court.

THE PLAINTIFF,
JATIN PATEL

BY: /s/
JON L. SCHOENHORN, ESQ.

FIRST AMENDMENT TO CONSTITUTION OF THE UNITED STATES

Freedom of religion, speech, and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT TO
CONSTITUTION OF THE UNITED STATES

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

NINTH AMENDMENT TO
CONSTITUTION OF THE UNITED STATES

Construction of enumerated rights

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
FEB 3 2003
OFFICE OF THE CLERK

No. 02-1005

In The

Supreme Court Of The United States

KEVIN SEARLES and DEBRA SWANSON,

Petitioners,

v.

JATIN PATEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

This action was commenced in the Connecticut Superior Court, Judicial District of Hartford at Hartford on June 3, 1999 by the respondent, Jatin Patel, against the two petitioner-defendants. The Complaint, which was amended on or about September 1, 1999, and again on or about May 18, 2000, originally alleged libel, invasion of privacy by "false light," and violation of civil rights pursuant to Title 42, United States Code § 1983.

On June 30, 1999, the petitioners filed for removal from the Superior Court to the United States District Court for the District of Connecticut, and on July 7, 1999, the case was docketed by the District Court.

The respondent's supplemental state law claims of libel and invasion of privacy by "false light" are not challenged in this appeal. In the third count, pursuant to Title 42 U.S.C. § 1983, the respondent alleged substantive due process violations of his right to association and familial integrity and relationships, in violation of the first, ninth and fourteenth amendments to the United States Constitution, as well as procedural due process violations, because of the petitioners' active efforts at "extinguishing of familial affection, contact and relationships." In a separate fourth count, labeled "stigma plus," the respondent alleged substantive due process violations by the petitioners, who defamed him by creating a stigma to his reputation which caused the destruction of his familial relationships, as well as his right to continued employment and ability to live in Connecticut. [1]

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[1]The Court of Appeals did not reach this separate substantive due process claim, addressing only the interference with familial association rights.

The petitioners filed their motion to dismiss on or about November 1, 1999. The respondent filed his memorandum in opposition on or about February 28, 2000. The United States District Court for the District of Connecticut (Stefan R. Underhill, U.S.D.J.) denied the petitioners' motion in a ruling dated November 14, 2000. The United States Court of Appeals for the Second Circuit affirmed on September 30, 2002 in an opinion by Cardamone, J., and joined by Pooler and B.D. Parker, JJ.

The respondent sought monetary and declaratory relief for injuries suffered when the petitioners recklessly and deliberately published and then disseminated documents falsely stating that the respondent brutally murdered his mother and sister, despite the absence of any evidence to support this outrageous assertion. The petitioners, unable to solve this heinous crime, simply fabricated "evidence." The petitioners then traveled to respondent's new home in Tennessee where Searles hand-delivered a letter to the respondent's wife warning her that if she did not turn against him, he would kill again, and that she and her children would be the next likely victims.

The petitioners filed an affirmative defense of qualified immunity, and then moved to dismiss under Federal Rule of Civil Procedure 12(c). The district court properly denied this motion, and the petitioners do not raise any issues that require granting of the instant writ of certiorari.

REASONS FOR DENYING THE WRIT

The petitioners unfortunately have misconstrued the Court of Appeals' decision in their efforts to seek review by this Court. Contrary to their assertions, the Second Circuit

decision does not conflict with any decision of this Court or with any other decisions by the various circuit courts. According to petitioners, the Second Circuit refused to address the qualified immunity issue because it was raised on a motion to dismiss rather than as a motion for summary judgment. Pet. at 5. However, the Second Circuit clearly and correctly construed the substantive due process right to familial association consistent with this Court's past precedents, and fully resolved the qualified immunity issue presented, *albeit* adversely to the petitioners' wishes.

The petitioners also assert that the Second Circuit's construction of the constitutional right to familial association conflicts with the decisions of other circuits, but then fails to name any case where a conflict exists, and then misstates the nature of the respondent's claim by suggesting that their own misconduct was only "incidentally" related to the destruction of the family ties. To the contrary, respondents complaint alleged that the respondents' actions intentionally were directed towards destruction of the petitioner's family because they believed it would further their investigative goals.

Finally, the petitioners claim that the Second Circuit decision leaves police officers without a "useful description of the contours of the right" to familial association, arguing essentially that in the field of fighting crime, any tactics directed against a family – no matter how outrageous or shocking – should be immune from civil liability in the name of serious crime investigation. The court of appeals decision correctly rejected this sweeping and unbridled assertion of authority claimed by petitioners.

I. THE COURT OF APPEALS CONDUCTED A PROPER ANALYSIS OF THE QUALIFIED IMMUNITY CLAIM.

At the outset, the petitioners erroneously suggest that the court below failed to follow this Court's admonition to resolve the qualified immunity issue at the earliest possible stage of the litigation. Pet. at 10. This is simply not correct. The court of appeals correctly cited to the two-prong analysis for qualified immunity claims as required by this Court's decision in *Wilson v. Layne*, 526 U.S. 603, 609 (1999) and then applied it. The court below first concluded that the Constitution has long prohibited unwarranted governmental interference with familial association "as a fundamental element of personal liberty," citing *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984). Pet. at 7a. It then noted that petitioners "concede[d that] a right to intimate association exists . . ." at least with regard to husband-wife and parent-child relationships *Id.* Finally, the court below held that the particular relationships that were destroyed, i.e. father-son, siblings, wife and children all "receive the greatest degree of protection because they are among the most intimate of relationships." Pet. at 8a.

It is patently clear that the court below conducted a full analysis of the qualified immunity claim, and rejected it. Moreover, since this writ arises on a motion to dismiss at the pleadings stage, the Second Circuit correctly construed the complaint as true and in a light most favorable to respondent. In that regard, the court below was presented with a factual scenario demonstrating outrageous misconduct on the part of petitioners:

On March 21, 1996, the respondent's mother, Champa Patel and his sister, Anita Patel, were murdered in their home in the Town of Windsor, Connecticut. Plaintiff's Amended Complaint at ¶6 (Pet. at 25a). The Windsor Police Department's investigation was commenced immediately thereafter by petitioners Swanson and Searles. ¶¶ 4,5,6 (*Id.*). After investigating the double homicide for two months without success,[2] the petitioners were frustrated and decided to fabricate evidence implicating the respondent in order to create an environment of hostility and mistrust among his family members. *Id.* ¶¶ 7,8 (*Id.*).

In May, 1996, Swanson concocted a fake typed "confession" implicating one of respondent's relatives, and circulated the document to the media - including two daily newspapers - while falsely representing that the letters were drafted on the respondent's typewriter. *Id.* ¶9 (Pet. at 25a-26a). Swanson also delivered a copy of this letter to the respondent's father. *Id.*

On or about June 9, 1997, Swanson and Searles drafted a "memorandum," entitled "Jatin Patel as suspect," that set forth a list of "facts" suggesting that the respondent was responsible for the murders of his mother and sister. *Id.* ¶10 (Pet. at 26a). The memorandum made false and reckless accusations about the respondent and was created expressly to respond to the family's inquiries as to why the police continued to label the respondent as the perpetrator of these heinous crimes. Furthermore, it was created with the intention that it be disseminated to members of respondent's family and subsequently to the news media. *Id.* ¶¶ 10,11 (Pet.

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[2] The crimes were never solved, and no arrests were ever made. Id. ¶ 7. (Pet. at 25a).

at 26a).

This memorandum described a non-existent "rift" between the respondent and his sister. *Id.* ¶ (Id.) This false claim of a "severe" family dispute was concocted because the petitioners knew that Anita's minor daughter, the respondent's niece, was an eye-witness to the murders who told police that she did not recognize the assailant. By falsely suggesting that the respondent had little contact with his niece, the petitioners created the false impression that the girl "would not recognize him" as the murderer. *Id.* The memorandum also falsely represented that the respondent was experiencing severe financial problems, and that his net worth plummeted from $300,000 to $32,000 from 1995 to 1996, in order to concoct a financial motive for the murders. It further claimed (falsely) that the respondent failed a polygraph test, refused to submit to further testing and refused to be interviewed by police. *Id.* ¶11. (Pet. at 26a-27a).

When these tactics failed to produce a break in the case, the petitioners traveled to the respondent's home in Tennessee, where on or about November 6, 1997, Swanson, with the approval and assistance of Searles, drafted a hand-written letter which she delivered to the respondent's wife, Seema, and others. In this letter, Swanson accused the respondent of "caus[ing] the brutal torture and murder of two other women," warning the respondent's wife that he would become angry enough "again" to murder her and their children, and falsely stated that the respondent led a "double life" that was responsible for the murders. *Id.* ¶12 (Pet. at 27a).

The petitioners also published details about the

respondent's private relationships with other women that predated his marriage, along with other personal details that would be deemed highly objectionable to average persons. *Id.* ¶¶ 30, 31 (Pet. at 27a-28a).

The actions of the petitioners had an extreme and devastating impact on the respondent's relationship with his family, who divided over the accusations. As a consequence, the respondent was ostracized from the majority of his family. *Id.* ¶ 53 (Pet. at 28a).[3] His father and siblings cut off all communication with him, thus completely destroying those familial relationships. The respondent was also forced to leave his employment and life in Connecticut and move to another state. *Id.* ¶¶ 80-82 (Pet. at 29a). Indeed, the petitioners' actions "caused the complete destruction of the respondent's familial relationships, right to continue his employment and right to continue to reside in the State of Connecticut." *Id.* ¶ 83 (Pet. at 29a).

The petitioners continue to minimize the devastating impact that their conduct had on the respondent and his family by suggesting that mere "ostracization" was not a significant enough impairment of his familial ties to constitute a violation. However, as set forth above, and as noted by the court below, the petitioners set out to disrupt the respondent's familial ties because they hoped that such animosity would lead family members to turn on him and, thereby, produce leads against him. However, while the petitioners were successful at turning the family against

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[3] While the complaint referenced the respondent's family *and friends*, both the District Court and the Court of Appeals limited their analysis to the impact of the petitioners' actions on the respondent's family relations.

respondent by their deception and falsehoods, it never led to any evidence implicating him in the murders. Thus, as the Second Circuit aptly stated, "the officers used their authority to interfere with his family relations in a particularly pernicious way: they attacked the relationships directly rather than simply erecting a legal barrier . . . to prevent contact between [respondent] and his family members." Pet. at 10a.

A. The Respondent Stated a Cognizable and Clearly Recognized Claim.

Despite petitioners' efforts to minimize their outrageous behavior, the respondent claims that the actions at issue were so egregious that they violated established constitutional rights, and that the petitioners would have reason to know that. To tell the respondent's family that he killed his mother and sister, to create fake evidence purporting to implicate him and then disseminate it to the press, and to threaten the respondent's wife and family by suggesting he will murder them, as well, in the hope of garnering investigatory leads to solve a crime, is so outrageous and extreme that the petitioners can hardly argue that they did not recognize the illegality and unconstitutionality of their behavior. A reviewing court must consider "not what a lawyer would learn or intuit from researching case law, but what a reasonable person in [petitioners'] position should know" about the appropriateness of the conduct. *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998). *See also Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (qualified immunity intended to provide government officials with ability reasonably to anticipate when their conduct may give rise to liability).

This Court's decisions in *Wilson v. Layne*, 526 U.S. 603 (1999) and *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) are the starting points of the constitutional analysis, with lower courts instructed "to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all," before reaching the question whether the right was clearly established at the time. However this Court also made clear last term in *Hope v. Pelzer*, 536 U.S. , 122 S.Ct. 2508, 2515 (2002), that there is no requirement that a plaintiff point to a prior case with "fundamentally similar" or "materially similar" facts in order to withstand a qualified immunity defense. The Second Circuit previously made the same point, noting that "the absence of legal precedent addressing an identical factual scenario does not necessarily yield a conclusion that the law is not clearly established." *Johnson v. Newburgh Enlarged School District*, 239 F.3d 246, 251 (2d Cir. 2001). In fact, "'the absence of a reported case with similar facts demonstrates nothing more than widespread compliance with' the well-recognized applications of the right at issue . . .." *Id.*

The respondent alleged violations of his constitutional rights "of association and familial integrity and relationships," and the "right not to suffer loss of liberty interests including the extinguishing of familial affection, contact and relationships, without due process of law, in violation of the fourteenth amendment to the United States Constitution." Pet. at 28a. Contrary to petitioners' assertions, these are cognizable federal claims that were clearly established at the time of their acts, and granting the instant writ will not further clarify these claims.

B. The Right to Associate with Family was Clearly Established in 1996.

This Court has recognized that there is a clearly established constitutional right to familial privacy and autonomy, and the Court of Appeals merely followed these precedents. The Constitution affords protection to two distinct types of association, "intimate association" and "expressive association." *Roberts , supra*, 468 U.S. at 617-18. The right to intimate association guarantees an individual the right to enter or remain in an intimate relationship free from undue intrusion by the state, which, at a minimum, extends to relationships that "attend the creation and sustenance of a family – marriage, childbirth, the raising and educating of children, and cohabitation with one's relatives." *Id.* Specifically, this Court has held that the Constitution "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977). The right to familial integrity is also protected by the Ninth Amendment and the Due Process and Equal Protection clauses of the Fourteenth Amendment and is so important that the Supreme Court has held that there is a "private realm of family life which the state *cannot* enter." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (emphasis supplied); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 842 (1977). The Supreme Court, in recognizing that there is a right to privacy, autonomy, and integrity in the family, has prohibited interference with intimate family decisions. *See Moore*, 431 U.S. at 499-500 (family living arrangements); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-40 (1974) (mandatory maternity leave without pay); *Griswold v.*

Connecticut, 381 U.S. 479, 486 (1965) (birth control). Further, the Court has affirmatively held that the government is not allowed to sever, alter, or otherwise affect family relationships without due process of law. *See Santosky v. Kramer*, 455 U.S. 745 (1982); *Little v. Streater*, 452 U.S. 1, 13 (1981); *Stanley, supra*, 405 U.S. at 651-52.

This Court also found that "[p]rotecting [the familial] relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty." *Roberts, supra*, 468 U.S. at 617-18. The Second Circuit previously had extended this fundamental constitutional right to familial relationships such as siblings, parent/child, and husband and wife. *See, e.g. Rivera v. Marcus*, 696 F.3d 1016 (2d Cir. 1982) (siblings); *Duchesne v. Sugarman*, 566 F.2d 817 (2d Cir. 1977) (parent/child). *See also, Singleton v. Cecil*, 155 F.3d 983 (8th Cir. 1998) (husband and wife). "Moreover, family relationships by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctly personal aspects of one's life." *Roberts, supra*, 468 U.S. at 619-20.

In the instant case, the court below, after finding deliberate interference with constitutionally protected associational rights, concluded that the mere fact that petitioners were investigating a serious crime did not authorize them to destroy a family in the name of detective work: "There is only the bare assertion that the officers were conducting a murder investigation. We do not know if their alleged attempts to destroy Patel's family were anything more than a fishing expedition; that is, they may have gone after Patel for no reason other than his relationship to the

victims." Pet. at 12a.

The respondent adequately alleged that petitioners actions were designed to interfere with both his marital relationship and his relationship with his father and siblings, and that, at least with regard to the latter individuals, they succeeded, without any opportunity for respondent to clear his name.

While the petitioners seek to minimize the nature of the interference with respondent's family by suggesting that the complaint alleges nothing more than that false information was disseminated about him, and that, as a result, his father and siblings merely stopped talking to him, Pet. at 17-18, this argument was clearly rejected by the Second Circuit. The petitioners here notably ignore the specific claims that they intended to blame the murders on the respondent by creating hostility and mistrust among family members; that this resulted in a "division" in the family, and that respondent "remains ostracized from the majority of his family;" that he suffered the "extinguishing of familial affection, contact and relationships;" and that petitioners' actions "*completely destroy[ed]* the plaintiff's familial relationships." As the Court of Appeals recognized in an earlier decision, the "most essential and basic aspect of familial privacy" is "the right of the family to remain together without the coercive interference of the awesome power of the state." *Duchesne, supra*, 566 F.2d at 825. *See also, Brokaw v. Mercer*, 235 F.3d 1000 (7th Cir. 2000)(substantive due process violation by officials for interference with family relations properly pled, where defendants forcibly removed child from parents without investigation and held him for four months).

Here, the Chief of Police and a local police detective, under color of law, were intentionally trying to turn the respondent's family against him under the dubious notion that this might develop into leads that could transform baseless suspicion into probable cause for arrest. By engaging in behavior which is likely to destroy family relationships, and which, in fact, does lead to such destruction, the petitioners interfered with constitutionally-recognized rights to familial association. Moreover, the "contours of the right" were "sufficiently clear that a reasonable official would understand that what he [was] doing violates that right." *Warren v. Keane*, 196 F.3d 330, 332 (2d Cir. 1999). Accordingly, the respondent alleged a violation of an established constitutional right.

As they did in the court below, the petitioners rely on *Griffin v. Strong*, 983 F.3d 1544 (10th Cir. 1993), in arguing that the right to family association is not absolute and that no constitutional violation occurred when a police officer lied to a suspect's wife. Pet. at 22. However, the defendants misread that precedent which nevertheless predates the actions here. In *Griffin*, police investigating a man suspected of child abuse lied to the suspect's wife and represented that her husband had confessed to the crime. *Id.* at 1545. Although the Tenth Circuit found that it did not violate the *wife's* right to familial association, it nevertheless determined that "the familial right of association is properly based on the 'concept of liberty in the Fourteenth Amendment,'" and that it constitutes a substantive due process right. *Id.* at 1547, 1549.

While the *Griffin* court determined that the interests of the state in investigating alleged child abuse were "important," the court also held that "the right to associate

with one's family is a very substantial right." *Id.* at 1548, *quoting Arnold v. Board of Education*, 880 F.2d 305, 312-13 (11th Cir. 1989). Nevertheless the Tenth Circuit concluded that the infringement on the wife's familial association rights was "slight" and "minimal." *Id.* at 1549.[4]

In the instant case, Swanson and Searles took actions that went directly to the core of the respondent's relationships with his father, siblings and wife, and the allegations demonstrate clearly, at least with respect to his father and siblings, that the relationship was severely and permanently "impacted." In fact, it was destroyed. By falsely telling the family that Jatin Patel killed his mother and sister, and by systematically inventing phony "evidence" in the very hope of dividing that family relationship, the petitioners' behavior clearly went to the core of the respondent's intimate family relationships and effectively destroyed them.

Furthermore, Swanson's letter to the respondent's wife implicated the core of the marital relationship by falsely stating that respondent was a murderer who *will kill* again, taking the lives of his wife and children in the process. The purpose was clearly to turn his wife against him, regardless of petitioners' assertion that the allegations are not specific enough to demonstrate that this was their intent.

Here, it is not merely the defamatory accusation of being labeled the murderer of his mother and sister which the

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[4] The *Griffin* court also held that "the lie did not go to the core of the [familial] relationship" because "it did not implicate the relationship by impugning [the wife's] conduct." *Id.* Clearly, the lies against plaintiff here did.

respondent claims gives rise to the liberty interest at issue. Rather, it was the intentional acts of the petitioners to brand the plaintiff in this manner for the very purpose of destroying his family relationships and his career because they saw this as an opportunity to plumb for non-existent investigatory leads – regardless of the consequences.

II. PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Despite ample authority demonstrating the violation of clearly established constitutional rights, the petitioners maintain that they are entitled to qualified immunity because the constitutional right at issue here is too nebulous to be understood by law enforcement agents trying to do their job. They suggest that the Court of Appeals decision will result in a parade of horrors, placing unreasonable restraints on police, due solely to the "consanguinity" of suspects. Pet. at 22-23.

The Second Circuit opinion said nothing of the kind. Instead, that court correctly interpreted the complaint to mean that petitioners set out to destroy Patel's family ties, with the potential by-product of leads in their stalled investigation, and that such behavior was clearly improper. It is this misconduct that the court below found to be a constitutional violation, and which was adequately articulated prior to the actions of petitioners in 1996.

The respondent adequately articulated a clearly established constitutional right – specifically freedom from unreasonable state intrusion into familial relationships. The court below correctly concluded that the petitioners should have known that their conduct would violate the petitioner's constitutional rights and would have a deleterious and

permanent impact on his family. Furthermore, as this course of conduct was deliberately designed to cause the destruction of the family, it is also clear that a reasonable official should have known that threatening the safety of the respondent's wife and children by suggesting that he would murder them because it is easier to kill the second time, was outrageous conduct that shocks the conscience.

CONCLUSION

For the foregoing reasons, the respondent respectfully requests that this Honorable Court deny the petition for a writ of *certiorari.*

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